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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 47167-2019
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-19-604
v.)	
)	
ZACHARY JAMES DEVAN,)	
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE DEBORAH A. BAIL
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Zachary James Devan appeals from his conviction for felony driving under the influence of alcohol (“DUI”), challenging the district court’s denial of his motion to suppress. The district court erred in denying Mr. Devan’s motion to suppress because the officer who stopped his vehicle based solely on her observation of the passenger-side tires of his truck crossing the fog line for approximately 100 yards, lasting three to five seconds, lacked reasonable suspicion for the stop.

Statement of Facts and Course of Proceedings

At approximately 9:23 p.m. on a cold, windy night in January, police officer Amanda Livas saw a truck traveling westbound in medium traffic on Franklin Road, near the intersection of Five Mile Road, in Boise, Idaho. (Tr., p.7, Ls.4-13, p.9, Ls.17-20, p.16, Ls.22-25.) The officer observed both passenger-side tires of the truck cross the fog line for approximately 100 yards, lasting three to five seconds. (Tr., p.7, Ls.14-24, p.15, Ls.1-7.) The officer testified she was concerned about the driving pattern she observed “[b]ecause . . . on that stretch of road there is about two feet [of pavement] to where a bicyclist could be riding or a person could be walking, and then it’s a field so there is nowhere else for a pedestrian or bicyclist to go,” so if a driver is traveling over the fog line, “he could have potentially hit somebody.” (Tr., p.12, Ls.1-11.)

Based solely on her observation of the truck’s passenger-side tires crossing the fog line, and despite the lack of any pedestrians or bicyclists in the area at the time, Officer Livas stopped the truck, presumably based on a suspicion that the driver had violated Idaho Code § 49-637(1).¹

¹ Officer Livas did not testify regarding the particular statute she believed had been violated. (*See generally* Tr., pp.5-17.) However, it is clear from the State’s briefing in the district court that it

(2/14/19 Tr., p.14, L.18 – p.15, L.4.) Officer Livas observed an open beer can in the center console area, and the driver and sole occupant of the truck, Mr. Devan, was later determined to have a blood alcohol content of .301. (2/14/19 Tr., p.7, Ls.17-20; Presentence Investigation Report (“PSI”), pp.51, 58.) Mr. Devan was never cited for a traffic offense.

Following a preliminary hearing, Mr. Devan was charged by Information with felony DUI and possession of an open container of alcohol in a motor vehicle. (R., pp.28, 40-41.) Mr. Devan filed a motion to suppress, arguing the evidence found in his vehicle and the statements he made to the officer should be suppressed because the officer lacked reasonable suspicion to stop his vehicle. (R., pp.64-72.) The prosecution argued the stop of Mr. Devan’s vehicle was permissible based on the officer’s observation of the passenger-side tires of his truck traveling over the fog line. (R., pp.77-83.) The district court denied Mr. Devan’s motion to suppress following a hearing. (R., p.85.)

Following the denial of his motion to suppress, Mr. Devan entered into an agreement with the State pursuant to which he agreed to plead guilty to felony DUI, reserving his right to appeal the denial of his motion to suppress, and the State agreed to dismiss the open container charge. (5/6/19 Tr., p.5, Ls.4-23; R., p.86.) The district court accepted Mr. Devan’s guilty plea. (5/6/19 Tr., p.13, Ls.11-15; R., p.86.) The district court sentenced Mr. Devan to a unified term of ten years, with two years fixed, and then suspended the sentence and placed Mr. Devan on probation for a term of ten years. (Tr., p.48, Ls.1-11; R., p.113.) The judgment of conviction was entered on July 3, 2019, and Mr. Devan filed a timely notice of appeal.² (R., pp.99-108.)

believed the officer had reasonable suspicion to stop Mr. Devan’s vehicle based on a suspected violation of Idaho Code § 49-637(1). (See R., pp.78-82.)

² The district court entered an amended judgment of conviction on July 8, 2019, which accurately reflects the sentence the district court pronounced at sentencing. (R., p.113.)

ISSUE

Did the district court err in denying Mr. Devan's motion to suppress?

ARGUMENT

The District Court Erred In Denying Mr. Devan's Motion To Suppress

A. Introduction

The district court denied Mr. Devan's motion to suppress because it concluded Officer Livas had reasonable suspicion to believe Mr. Devan violated Idaho Code § 49-637(1) when both passenger-side tires of his truck crossed the fog line for approximately 100 yards, lasting three to five seconds. The district court erred. It is clear from *State v. Neal*, 159 Idaho 439 (2015), and *State v. Fuller*, 163 Idaho 585 (2018), that the fog line is *not* a lane barrier, and that an isolated incident of temporarily crossing the fog line does not constitute a violation of § 49-637(1). While driving across the fog line may be considered when evaluating whether an overall pattern of erratic or unsafe driving gives rise to a reasonable, articulable suspicion that § 49-637(1) has been violated, there were no additional indicia of erratic or unsafe driving in this case. The theoretical possibility that a bicyclist or pedestrian could have been endangered by Mr. Devan's driving is not enough to constitute a violation of § 49-637(1).

B. Standard Of Review

"In reviewing a district court order granting or denying a motion to suppress evidence, the standard of review is bifurcated." *State v. Purdum*, 147 Idaho 206, 207 (2009) (citation omitted). "This Court will accept the trial court's findings of fact unless they are clearly erroneous. However, this Court may freely review the trial court's application of constitutional principles in light of the facts found." *Id.* (citations omitted). "At a suppression hearing, the power to assess the credibility of witnesses, resolve factual conflicts, weigh evidence, and draw

factual inferences is vested in the trial court.” *State v. Aguirre*, 141 Idaho 560, 562 (Ct. App. 2005) (citations omitted).

C. The District Court Erred In Concluding Officer Livas Had Reasonable Suspicion To Believe Mr. Devan Violated Idaho Code § 49-637(1) When Both Passenger-Side Tires Of His Truck Crossed The Fog Line For Approximately 100 Yards, Lasting Three To Five Seconds

The Fourth Amendment to the United States Constitution guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” U.S. Const. amend. IV; *see also* Idaho Const. art. I, § 17. While a traffic stop constitutes a seizure under the Fourth Amendment, “[l]imited investigatory detentions are permissible when justified by an officer’s reasonable articulable suspicion that a person has committed, or is about to commit, a crime.” *State v. Morgan*, 154 Idaho 109, 112 (2013). As such, a traffic stop can be justified if either (1) an officer has a reasonable, articulable suspicion that the driver has committed an offense, such as a traffic offense, or (2) an officer has a reasonable, articulable suspicion that the driver is engaged in other criminal activity, such as driving under the influence of alcohol. *Neal*, 159 Idaho at 442.

Idaho Code § 49-637(1) states, in pertinent part: “Whenever any highway has been divided into two (2) or more clearly marked lanes for traffic . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.” In *Neal*, our Supreme Court considered whether an officer had reasonable suspicion of criminal activity to justify a traffic stop where he observed the defendant “drive his pickup onto, but not across” the fog line on two occasions. 159 Idaho at 441. The Court held “that driving onto but not across the lane marking the right edge of the road does not constitute a violation of Idaho Code section 49-637

and therefore the officer's stop of [the defendant] was not justified." *Id.* at 447. The Court arrived at this conclusion by analyzing, and ultimately concluding, that the fog line itself is within the lane of travel. *See id.* at 445-46.

In *Fuller*, our Supreme Court considered whether an officer had reasonable suspicion to stop the defendant's vehicle where the parties stipulated the front passenger-side tire of the vehicle crossed the fog line. 163 Idaho at 587. The State attempted to distinguish *Neal* by noting the parties in *Fuller* stipulated the fog line was temporarily crossed, "whereas in *Neal* the fog line was temporarily touched by not crossed." *Id.* at 589. The *Fuller* Court rejected this distinction, stating it revealed "a misunderstanding of *Neal*." *Id.* The Court explained that "[n]owhere in *Neal* did we suggest that the fog line signifies a lane barrier" and, to the contrary, "[w]e were careful to emphasize that the fog line is *not* a lane barrier." *Id.* (emphasis in original). The Court explained "given that the fog line does not signify a formal lane barrier, an isolated incident of temporarily crossing the fog line . . . does not violate section 49-637(1)." *Id.* at 590.

The fact that the fog line does not signify a formal lane barrier should resolve the instant appeal, as it did *Fuller*. Officer Livas observed the passenger-side tires of Mr. Devan's truck cross the fog line in an isolated incident, lasting from three to five seconds. (Tr., p.7, Ls.14-24, p.15, Ls.1-7.) Because the fog line does not signify a formal lane barrier, a temporary crossing of the fog line, even by two tires instead of one tire, does not violate § 49-637(1).

The district court concluded to the contrary, noting, as a "distinguishing factor" that "there is nothing on the roadway [such as potholes, steel plates, or fallen boxes] that would cause a driver to have to move out of the way." (Tr., p.26, Ls.6-20.) But because the fog line does not signify a formal lane barrier, Mr. Devan never left his lane within the meaning of § 49-637(1), and thus never violated the statute. The district court concluded the officer's observations were

“enough to warrant a stop and further investigation,” *see* Tr., p.27, Ls.18-21, but there was nothing to further investigate.

The *Fuller* Court did recognize that touching or crossing a fog line can be considered as one factor in evaluating a defendant’s overall driving pattern. *See Fuller*, 163 Idaho at 590. The Court said: “To be sure, driving onto or across the fog line may be considered when evaluating whether an overall pattern of erratic or unsafe driving gives rise to a reasonable, articulable suspicion that 49-637(1) has been violated under the totality of the circumstances.” *Id.* But the Court went on to state that the suspicion “must be based on more than one tire temporarily touching or briefly crossing the fog line.” *Id.*

Here, Mr. Devan did not display an overall pattern of erratic or unsafe driving. On the contrary, his passenger-side tires merely crossed the fog line for a period of three to five seconds. (Tr., p.7, Ls.4-24, p.15, Ls.1-7.) Officer Livas testified she was concerned Mr. Devan could potentially have hit a pedestrian or bicyclist, but there were no pedestrians or bicyclists in the area at the time. (Tr., p.12, Ls.1-11.) If the mere possibility of a pedestrian or bicyclist traveling outside the fog line was sufficient to make a driver touching or crossing that line be in violation of § 49-637(1), then *Neal* and *Fuller* would have been decided differently. Officer Livas testified that when the fog line ends on Franklin Road, and that section of the roadway turns into a right-turn lane, Mr. Devan “kind of veered left a little into the lane that goes straight.” (Tr., p.9, Ls.2-9.) That is, he continued driving straight ahead, appropriately in his lane and within the speed limit. Under a straightforward application of *Neal* and *Fuller*, Officer Livas lacked reasonable suspicion to believe Mr. Devan violated § 49-637(1), and thus lacked reasonable suspicion to stop his vehicle.

CONCLUSION

Mr. Devan respectfully requests that this Court vacate his conviction, reverse the district court's order denying his motion to suppress, and remand this case to the district court for further proceedings.

DATED this 13th day of January, 2020.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 2020, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

AWR/eas